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OCT 5 1984
ALEXANDER L. STEVAS,
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NO. 84-55

In the Supreme Court of the United States

OCTOBER TERM, 1984

EMPLOYERS NATIONAL INSURANCE COMPANY,

Petitioner

versus

JORGE OCHOA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1.

There is no conflict between the decision of the United States Court of Appeals for the Fifth Circuit and *Bloomer v. Liberty Mutual Insurance Company*, 445 U.S. 74, 100 S.Ct. 925 (1980).

Bloomer dealt with a sitution where the recovery from a longshoreman's third party action against a vessel was sufficient to pay in full both the expenses of the suit, including attorney's fees, and the stevedore's lien. The gross recovery in Bloomer was sufficient to allow the stevedore's lien to be paid in full regardless of whether the attorneys fees or the stevedore's lien "come off the top." Thus, the Court never reached the question presented here, i.e. the priority of payments when the gross recovery is insufficient to fully pay both attorneys fees and the stevedore's lien. In fact, the Court expressly declined to rule on the question. 445 U.S. at 86 n. 13.

2.

The decision of the United States Court of Appeals for the Fifth Circuit is consistent with the rationale of Bloomer, and with The Longshoremen's and Harborworkers' Compensation Act.

By artful phrasing of the issue, Petitioner attempts to place the decision of the Fifth Circuit in conflict with the rationale of Bloomer, that the stevedore cannot be charged with a portion of longshoreman's attorneys fees under the "common fund doctrine".

However, *Bloomer* did not hold that the attorneys fees could be charged with the stevedore's lien. Although Bloomer did not attempt to decide this issue, a number of statements in the *Bloomer* opinion, as well as references to the legislative history of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §901 show that, while the stevedore cannot be made to pay the longshorman's legal fees, the stevedore's lien extends only to the **net** recovery by the longshoreman after payment of the expenses of the suit, including legal fees. *Ochoa v. Employers National Insurance Company,* 724 F.2d. 1171, 1175-7 (5th Cir. 1984); *Incorvaia v. Hellenic Lines, Ltd, "Grigorios-C IV"*, 668 F.2d. 650, 652 (2nd Cir. 1982).

It should also be noted that in the Court's illustration of the two suggested methods of distribution in *Bloomer,* as well as its use of the term "expenses" to include the longshoremens attorneys fees, the opinion further implies that attorneys fees are an expense of the suit, to be paid before reimbursing the stevedore. 445 U.S. at 76 n. 2.

The opposing view, expressed in the dissent in *Ochoa,* and in *Johnson v. Sioux City & New Orleans Barge Lines, Inc.,* 629 F2d. 1244(7th Cir. 1980), is that giving attorneys fees priority over the stevedore's lien only encourages attorneys for longshoremen to bring third party suits on behalf of longshoremen, even though the longshoremen have little chance of realizing a recovery above the amount of attorneys fees and stevedore's liens. The assumption is that longshoremen's attorneys, lured by

the prospect of substantial fees, routinely usurp the stevedores' right of action by filing suits which should be filed by the stevedore, and in which the longshoremen have little to gain. This assunption is not valid in a general sense, and is certainly not valid in the instant case.

For several reasons, stevedores often fail to pursue claims as envisioned by the Act.

First, the stevedore may be afraid to jeopardize its relationship with a valued customer.

Second, the expense and risk of a third party action may not justify the stevedore's pursuit of the action, since the stevedores potential real gain is limited to the amount of its lien.

Respondent submits that the problems of insufficient recovery in this case, and in most similar cases, are caused simply by unexpectedly low verdicts.

At the trial of the instant case, expert medical and economic testimony put Respondent's partial loss of earning capacity at above $100,000. The vessel owner made an offer of settlement during trial of $80,000, including a waiver of the compensation lien. Liability was doubtful, and was only established by a witness, who was discovered a few weeks before trial, and whose veracity was hotly disputed by the vessel. This was hardly a case with "little potential for substantial recovery over and above the compensation award" or one where the claim appeared

"meritorious but the longshoreman's potential incremental recovery is small." *Johnson*, 629 F2d. at 1249. It was a case with difficult liability, but with the potential for a large verdict.

Additionally, out of pocket expenses in bringing the case to trial were over $6000, and counsel for Respondent spent well over a hundred hours in preparing for trial. If the the stevedore had brought the action, the cost of preparing for trial would have been well over $10,000. In view of the liability problems, and the large expense, it is not reasonable to suppose that the stevedore would have risked such an amount to recover a lien of only two to three times that amount which existed at the time of trial. Thus, the *Johnson* rationale is inapplicable.

3.

The decision of the United States Court of Appeals for the Fifth Circuit does not result in double recovery for Respondent in excess of that which would result from Petitioner's proposed distribution.

The third question presented by Petitioner is not addressed in its argument, but is an apparent reference to the *Bloomer* opinion's concern with "double recovery", i.e. the longshoreman's receipt through the effects of the Act of an amount greater than he would have received from a negligence suit in the absence of the Act. 445 U.S. at 86-87. As was pointed out in the dissent in *Ochoa*, in cases like the

instant one, the longshoreman will *always* receive an amount greater than he could have through the negligence action alone. 724 F2d. at 1180. However, the stevedore's proposed distribution scheme would result in a greater double recovery by the longshoreman than would the method proposed by Respondent (total recovery $42,025 plus $3,689 as opposed to only $42,025).

4.

The increase in the stevedore's lien during the pendancy of an appeal does not change the priorities of the distribution of the funds recovered in the suit.

Petitioner contends that its recovery should not be adversely affected by an increase in the stevedore's lien during pendency of an unsuccessful appeal "contrary to the stevedore's interests."

This is a false issue. Carried to its logical conclusion, Petitioner's argument requires that, if at any point in the litigation the longshoreman has within his grasp an amount sufficient to satisfy the stevedore's lien, then he must forego all of his remaining rights of action in order to ensure payment of the stevedore's lien in full.

Petitioner's argument would apply equally to a longshoreman's refusal to accept an offer of settlement before trial. If such an offer were greater than the sum of out of pocket expenses, attorney's fees, and the stevedore's lien, then proceding to trial would be "contrary to the stevedore's interests."

Additionally, Petitioner mistates the effect of the appeal on the stevedore's recovery. The appeal did not cause "its recovery to be reduced." Under either of the proposed distributions presented in the Petition, the stevedore's recovery would be greater than it would have been immediately after trial.

Under the stevedore's proposed distribution, Respondent's counsels' fees would be reduced substantially merely because they represented their client vigorously in appealling what they believe was an unreasonably low verdict. Acceptance of Petitioner's argument would result in a significant disincentive to longshoremen's counsel to represent their clients to the fullest.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writs of certiorari be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the above opposition to petition for writ of certiorari were served upon counsel for petitioner, first class postage prepaid, addressed to his office in New Orleans, Louisiana, this 3rd day of October, 1984.

Owen J. Bradley
Attorney for Respondent